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No. 91-1426

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

REPLY TO BRIEF IN OPPOSITION

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JURISDICTION

Petitioner files this reply brief pursuant to rule 15.6 of the Supreme Court Rules.

ARGUMENT

THE ISSUE OF WHETHER AN ENTRY WAS JUSTIFIED BY A LAW ENFORCEMENT OFFICER'S REASONABLE, BUT MISTAKEN, BELIEF THAT CONSENT WAS GIVEN WAS RAISED AND DECIDED BELOW

Respondent contends in his Brief in Opposition that petitioner did not raise the argument at issue here until filing the Petition for Review in the California Supreme Court: "In its arguments before the magistrate and in its respondent's brief filed with the Court of Appeal, petitioner argued only that the defendants had consented to the police entry into the hotel room. Petitioner's argument that the entry could be justified based upon the police officers' reasonable belief in the existence of consent was first raised in petitioner's petition for review filed with the California Supreme Court." Brief in Opposition at 10. Respondent is mistaken. The issue

we present here was raised and briefed by both parties in the state Court of Appeal and was addressed in that court's opinion.

Argument IB of our brief before the Court of Appeal was captioned: "Officer Henry Asked For and Received Valid Consent To Enter The Room." Respondent's Brief at 12. In support of our argument that the officers' entry was justified, we stated:

> "On the question of consent, the magistrate stated, 'Now whether the defendant said "Yes" when they said, "May we enter or not," if in fact the officer reasonably believed he heard it, I think that justifies that entry.' [Citation.] Although not the most crystal-clear statement, the only rational interpretation of the magistrate's words is that he was making a factual finding that the officer *heard what he thought was permission to enter.* The magistrate implicitly found that belief to be reasonable, but acknowledged that reasonableness was a question of law which would be later re-determined by a reviewing court. In this way, the magistrate could 'still give credence to the

defendant's side of the story' [citation] by finding that, '[p]ossibly the officers heard what they thought was yes.' [Citation.] The magistrate was using the words 'possibly' and 'if' to say, in effect, '*Given* that the officers heard something, and that it is *possible* that they thought they heard words of permission, the question is one of *reasonableness*, about which the reviewing court will have the final say.' Keeping in mind that the defense motion was denied, it logically follows that the magistrate found Officer Henry's belief reasonable, and that there was therefore valid consent given."

Id., n. 3; emphasis in original.

Not only did we *raise* the issue of the officer's reasonable belief, but respondent *countered* our argument in his reply brief in the state Court of Appeal by reiterating his earlier contention in the Appellant's Opening Brief:

"As discussed on page 16 of Appellant's Opening Brief, the magistrate merely found that the officers reasonably believed that they had consent to enter and that belief

justified their entry. The magistrate's failure to make a necessary finding of fact mandates reversal.

[¶] . . . .

Apparently, respondent contends that if an Officer subjectively believes (correctly or incorrectly) that he had received consent to enter, then any ensuing entry is legal. Respondent cites no law in support of this position. Although consent may make a warrantless search reasonable under the Fourth Amendment, a factual finding that there was actual consent is a prerequisite to such a conclusion. Whether an officer subjectively 'believed' he had consent to enter cannot be equated with actual consent. . . .

Furthermore, based upon the facts of this case, no reasonable fact finder could have found that the officers received consent to enter the hotel room. . . ."

Appellant's Reply Brief at 3-4.

The Court of Appeal noted that the issue of reasonable belief in consent was joined by the parties in that proceeding. The court quoted from our argument,

but then adopted respondent's position that the magistrate was required to make a factual finding that actual consent existed. The court expressly rejected our argument, and that of the magistrate below, that an officer's reasonable belief is sufficient to justify the entry. Typed opn. at 9-11. We have already discussed in our petition the cases relied on by the Court of Appeal, and will not repeat that discussion here.

As acknowledged by respondent (Brief in Opposition at 10), we presented this clear issue to the California Supreme Court in our Petition for Review: "This case presents the question of whether the Fourth Amendment requires a finding that the defendant *actually* consented to a warrantless entry, as opposed to finding that the officer's mistaken belief was reasonable." Petition for Review at 9; emphasis in original.

Respondent's contention that this issue was not raised below in a timely manner is erroneous and must be rejected. As for the other contentions in the Brief in Opposition, we feel no reply is necessary.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for a Writ of Certiorari to the California Court of Appeal for the Sixth Appellate District be granted.

DATED: May 22, 1992.

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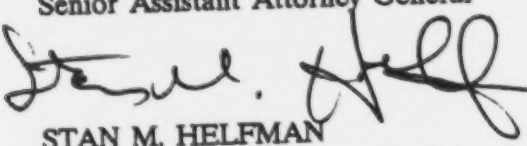

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